82-237

No. ____

Office - Supreme Court, U.S.
FILED
OCT 18 1982

In The

Supreme Court of the United States

October Term, 1982

STATE EX REL. INTAKE WATER CO.,
Petitioner,

vs.

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA AND CECIL WEEDING, VIOLA HERAK, WILLIAM H. BERTSCHE, CHARLES L. HASH, GORDON G. HOLTE, LAND M. LINDBERGH and RICHARD SPALDING, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; LEO J. BERRY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND UTAH INTERNATIONAL, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

RESPONDENTS'* BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Yellowstone River Compact, which was approved by the signatory States of Montana, Wyoming and North Dakota and by the United States Congress, require Montana to recognize a priority of filing in Wyoming, even though the water which is the subject of that filing is to be used in Montana and was apportioned to Montana under the Compact, and Article XVIII of the Compact specifically provides that no signatory State shall be divested of jurisdiction of the water apportioned to that State?

2. Did the Montana Supreme Court violate the Yellowstone River Compact by ruling that Montana officials acted legally and pursuant to the Compact when the state assigned a priority of filing for the use of water in Montana by recognizing a prior competing filing in Wyoming?

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RESPONDENTS'* BRIEF IN OPPOSITION

The Board of Natural Resources and Conservation of the State of Montana and Cecil Weeding, Viola Herak, William H. Bertsche, Charles L. Hash, Gordon G. Holte, Land M. Lindbergh and Richard Spalding, in their capacities as the individual members thereof; Department of Natural Resources and Conservation of the State of Montana; and Leo J. Berry, Director, Department of Natural Resources and Conservation of the State of Montana, who are the Montana governmental agencies and individuals, re-

spectfully request that this Court deny the petition for Writ of Certiorari, seeking review of the Montana Supreme Court's opinion in this case. That opinion is reported at 645 P. 2d 383.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Review By This Court Is Precluded Because The Judgment Below Is Based On Adequate And Independent State Ground.

The Montana Supreme Court held that the State correctly assigned Utah International, Inc. (Utah) a priority in conformity with Wyoming law as required by the Yellowstone River Compact (Petitioners, Appendix F, 57a). It also held that the State correctly assigned Utah its priority date to the Montana Water Use Act.[1] This Court has long held that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Mueller*, 296 U. S. 207, 210 (1935).

The inquiry is whether the Montana Supreme Court intended to rest its decision independently on state ground.

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1 The Court stated:

> "Intake could not prevail even under Montana law. The Department is given the discretion under Montana's Water Use Act of allowing up to 18 months for correction of defective filing. Utah filed the appropriate Montana forms with the Department within that period. The Department correctly assigned Utah the priority date of its first filing. It had no clear legal duty to do otherwise."

See *Delaware v. Prouse*, 440 U. S. 648, 652 (1979). This intent is clearly expressed in the opinion below wherein the Montana Supreme Court stated:

> "Intake could not prevail under Montana law. The Department is given the discretion under Montana's Water Use Act of allowing up to 18 months for a correction of defective filing. Utah filed the appropriate Montana forms with the Department within that period. The Department correctly assigned Utah the priority date of its first filing. It had no clear legal duty to do otherwise."

645 P. 2d 383, Petitioner Appendix F, 57a.[2]

This language indicates that the decision is based on independent and adequate state grounds. Accordingly, review should be denied.

Petitioner argues that while the Montana Supreme Court added what would appear to be a state-law holding, such a holding was premised upon the concept that Montana was required under the Yellowstone River Compact to give effect to the Wyoming priority date, if properly filed in Montana. Petition for Certiorari, p. 11, note 17. While it is true that Utah filed its original application in Wyoming with duplicate filing in Montana pursuant to Article VII (B) of the Yellowstone River Compact, the premise for the State-law holding was that an application was filed in Montana (although on Wyoming forms) and Montana law specifically authorized the State to allow an applicant up to 18 months to correct and complete an appli-

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2 The discretionary statute referred to by the Montana Supreme Court is cited as 85-2-302, MCA. See Petitioner Appendix H, 87a-88a.

cation. Since the state statute was discretionary, no clear legal duty could exist for mandamus to lie. In the face of a discretionary act Petitioner could not prevail. The Montana Supreme Court so held. This holding is based on independent and adequate state ground. For that reason, review by this Court would not be appropriate.

2. There Are No Special Or Important Reasons For Review.

While it may be true that the outcome of this case may be important to the two competing companies whose proposed multi-million dollar projects are at stake, there is no basis to assume that this case or one similar to it will ever rise again. As Petitioner notes Article XVIII of the Yellowstone River Compact is unique to the Yellowstone River Compact and has heretofore not been included in other interstate compact. Petition for Certiorari, p. 13.

The Article XVIII issue raised by Petitioner has heretofore not been addressed by this Court.[3] The fact that a given issue has not been resolved by the Supreme Court has never been a recognized basis for the grant of certiorari. Further the Article XVIII issue in the present case is unlikely to recur and is too narrow to warrant review by this court on certiorari. It can only arise in the Yellowstone River Basin, between two or more competing water applicants, on a source of water where one project is necessarily preempted by the development of the other, where one or more of the applicants does not make recipro-

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3 There is no conflict between the various courts on this issue nor is there any real likelihood that one will arise given the fact that Article XVIII is unique to the Yellowstone River Compact.

cal contemporaneous duplicate filings in both Montana and Wyoming pursuant to Article VII of the Compact, and where Montana exercises its discretionary powers in accepting a correct and complete application for permit to use water. In a nutshell the questions raised by Petitioner turn on the particular facts of this case alone and are of interest only to the parties to it.

3. The Result Below Was Fair.

Under the appropriation rights doctrine beneficial use of water is the basis, the measure, and the limit of the water right. This is the doctrine used by the Yellowstone River Basin states for determining who has the right to use water at any given time. The first beneficial appropriation in time is prior in right to those rights established in each state. This doctrine continues to be recognized by Montana.[4]

The Montana Water Use Act of 1973 which created a permitting process for the acquisition of water rights in Montana provides in pertinent part at § 85-2-401 (2), MCA:

> "Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, 85-2-310 (3), and 85-2-313."

In accordance with Montana law, as between two competing applicants the applicant to first file for the right to

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4 Section 85-2-401 (1), MCA, provides:

> "As between appropriators, the first in time is the first in right."

use water is entitled to a priority of appropriation. Such a doctrine epitomizes fairness.

In the case before this court the proposed appropriations are in the Yellowstone River Basin and subject to the Yellowstone River Compact. As it applies to this case Article VII (B) of the Compact provides that each claim initiated for an appropriation of water in Wyoming for use in Montana shall be filed in the appropriate state office of Wyoming and a duplicate copy of the application shall be filed in the appropriate state office in Montana.[5] On November 20, 1973, less than 5 months after the implementation of the Montana Water Use Act of 1973, Utah filed its application in Wyoming, on Wyoming forms.[6] Duplicates of the Utah application were sent to Montana.[7] The duplicates contained much of the same information that is required on the Montana forms.[8] Some 10 months later, on September 24, 1974, Intake made its application filings in Montana and Wyoming.[9]

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5 Article VIII (B) provides:

> "Each claim hereafter initiated for an appropriation of water in one signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used."

6 Opinion and Order of the Montana Supreme Court, Petitioners Appendix F, 50a.

7 Id. at 51a.

8 Id. at 51a.

9 Id. at 52a.

The practical effect of the Montana Supreme Court's holding is that because Utah made a substantive, good faith effort to comply with Article VII (B) of the Yellowstone River Compact and the Montana Water Use Act of 1973, Utah is entitled to priority of appropriation. Such a holding is fair. It is fair because it favors substance over form while recognizing the doctrine of "the first in time is the first in right."

Because the decision below is fair this Court need not exercise its extraordinary and discretionary jurisdiction.

4. The Opinion Below Was Accurate And Correct.

Petitioner centers its argument that the decision below was wrong on what it perceives as the Montana Supreme Court's failure to apply the mandate of Article XVIII of the Yellowstone River Compact. Petition for Certiorari, p. 15. Contrary to Petitioner's assertion, the court below was correct in rejecting the Article XVIII argument.

Article XVIII of the Yellowstone River Compact provides:

> "No sentence, phrase, or clause in this compact or in any provision thereof shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact."

It has been a long respected doctrine, recognized in both state and federal courts, that a state does not have extraterritorial jurisdiction to control water diversions in another state, even though the water was used within the first state. See generally, *Lindsey v. McClure,* 136 F. 2d 65 (10th Cir. 1943); *State ex rel. Sorenson v. Mitchell Irrigation District,* 129 Neb. 586, 262 N. W. 543 (1935).

Article XVIII of the Yellowstone River Compact is simply a restatement of the extraterritorial jurisdiction doctrine. By recognizing November 20, 1973 as the priority date of filing by Utah, Montana has acted in accordance with the provisions and mandates of Article VII of the Yellowstone River Compact. By so doing Montana has not attempted to extend its jurisdiction beyond its state boundaries all in accordance with Article XVIII of the Yellowstone River Compact.

Furthermore, the Court below, by its decision did not divest Montana of jurisdiction over waters of the Powder River allocated and apportioned to Montana under Article V of the Yellowstone River Compact. By recognizing November 20, 1973, as the priority date of Utah's filing, Montana has complied with Article VII of the Yellowstone River Compact as well as Montana state law.[10] Montana has not attempted to extend its jurisdiction beyond the state boundaries. Montana has not given up jurisdiction over the control of the use of water by Utah within the boundaries of the State of Montana.

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10 Section 85-2-401, MCA, provides that the priority of appropriation dates from the filing of an application for a permit with the Water Department of Natural Resources and Conservation. Section 85-2-302, MCA, provides that an application does not lose priority of filing because of defects, if the application is corrected, completed and refiled with the state within such time as the state allows, up to 18 months. As stated in the Montana Supreme Court Opinion (Petitioners, Appendix F, 51a), on March 15, 1974, Montana notified Utah that if Utah filed the information for the same project on Montana's forms, the priority date of November 20, 1973, would be retained pursuant to Sections 85-2-301 and 85-2-302, MCA. Utah filed the appropriate Montana forms within the 18 month period. Under Montana law Montana had no clear legal duty to do otherwise than to assign Utah the priority date of its first filing.

As the State has argued, throughout the proceedings below, and as Utah has conceded, Montana will regulate Utah's use of the Yellowstone River compact waters within Montana. Montana will decide if the use is beneficial, as required by Montana State law. Montana will regulate all construction by Utah within Montana. Montana will prevent Utah from wasting the water, will determine if Utah abandons the appropriation right and will have jurisdiction over any changes in the place of purpose of water use. Additionally, Montana will control water quality, and mitigate adverse environmental impacts which result from Utah's proposed water uses. Montana has jurisdiction over Utah's appropriation to the extent the water is used in Montana. Under the decision below there is no surrender of jurisdiction by Montana.

The result below was correct. For this reason, review by this Court would not be appropriate.

CONCLUSION

For all of the reasons outlined above, the Petition for Certiorari should be denied.

Respectfully submitted,

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